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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 175

EL CAMPO RICE MILLING COMPANY,
a Corporation,
Petitioner,

vs.

MIRAVALLE SUPPLY COMPANY, INC.,
a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. .....

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a Corporation,
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MIRAVALLE SUPPLY COMPANY, INC.,
a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Fred W. Vinson, Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

Comes now El Campo Rice Milling Company, a corporation, petitioner, and respectfully petitions this Honorable Court to grant a writ of certiorari to the United States Court of Appeals, Eighth Circuit, and to remove therefrom to this Court for review, the record in the case lately pending in said Court of Appeals styled Miravalle Supply

Company, Inc., a corporation, appellant, vs. El Campo Rice Milling Company, a corporation, appellee, being Cause No. 14003 on the civil docket of said United States Court of Appeals, Eighth Circuit.

Ten duly certified copies of the record, including all the proceedings in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, wherein said cause was instituted, are herewith filed.

Your petitioner represents that it is aggrieved by the opinion and judgment of the United States Court of Appeals, Eighth Circuit, entered in said cause, wherein said Court of Appeals reversed the judgment of the trial court and remanded said cause thereto with instructions to enter a judgment as provided for in said opinion of said Court of Appeals, and thereafter denied this petitioner's petition for a rehearing of said cause.

Summary Statement of Matter Involved.

This cause of action was tried in the District Court of the United States for the Eastern Division of the Eastern District of Missouri before Honorable George H. Moore, Judge, a jury being waived, and resulted in findings and a judgment for this petitioner in the sum of $11,958.15 plus interest and for the respondent on a counterclaim in the sum of $560.00 plus interest. The District Court acquired jurisdiction of the cause by reason of the diversity of citizenship of the parties and because the amount involved, exclusive of interest, was in excess of $3,000.00.

The controversy between the parties was incident to the delivery by the petitioner to the respondent of about 2,205,390 pounds of rice. The deliveries were made in fifteen shipments, the first occurring on October 18, 1946, the last on April 5, 1947. The shipments were made and

received pursuant to a paper writing marked Plaintiff's Exhibit 1 (R. 35) which was prepared on a printed form adopted by the rice industry in 1937. This contract was executed and performed while our nation was at war and during the time that Congress had enacted price controls.

Said contract, partly printed and partly typewritten, called for 22,000 pockets (2,200,000 pounds) of 96% Whole Grain Texas Patna Rice, of the quality that the parties pack in cartons. The typewritten portion of the contract provided as follows: "Time of shipment: 2,000 pockets October, 1946, 5,000 pockets each November, December, 1946, January and February, 1947, ceiling price at time of shipment f. o. b. El Campo, shipping instructions to be furnished by buyer."

Printed provision (1) of said contract provided that the "buyer agrees to furnish in writing complete shipping instructions to the seller at least five full business days before the date each shipment is required to be made." Printed provision (5) recited: "The seller shall not be liable for damages arising from his failure to make delivery caused by . . . strikes, . . . postponement or suspension in sailing of steamers, . . . or any circumstances or accident beyond his control." Printed provision (8) stated in part that "one per cent discount to be allowed for payment of draft within ten days of its date, otherwise net cash."

On October 26, 1946, respondent wired petitioner to send 5,000 pockets of Patna "against contract between November 1st and November 7th" (Pltf.'s Ex. 18, R. 67). Petitioner shipped some rice on November 7, some on November 14 that was not invoiced until November 18, and the balance on and after November 25 (R. 22, 23, 29, 30, 31). On November 18, 1946, the ceiling price for Texas Patna was increased from $9.90 to $10.60 per hundredweight and for Early Prolific from $7.80 to $8.65 (R. 29). Except for

the November 7th shipment, which was priced at the lower rate, petitioner charged and respondent paid under protest at the higher rate for all other November shipments (Pltf.'s Ex. 32, R. 76).

At the time the contract was executed and during the period of performance under the contract, rice was in short supply by virtue of war time demands and price control and this fact was known to both parties (R. 27, 69, 73, 75). In order to assure itself of getting some rice under these conditions, respondent on October 16 urged petitioner to expedite deliveries and authorized shipment of rice in "pockets or cartons or mixed cars" (Pltf.'s Ex. 17, R. 67). On November 25, 1946, respondent wired its consent that any "substitute variety except Pearl in pockets or packages" would be acceptable against contract (Pltf.'s Ex. 26, R. 73). The president of the petitioner stated that it "was extremely difficult to obtain rice" and that this "was due to maritime strikes in the Gulf ports, and other untoward market conditions" (R. 27). In a letter to respondent's president, respondent was advised of black market conditions that caused petitioner "trouble getting stocks now" (Pltf.'s Ex. 21, R. 69).

At no time during performance under the contract and not until after suit was filed did respondent assert a claim or mention that it was entitled to a discount. Said contract was prepared on a form in use in the rice industry since 1937, which form provided for a discount. However, none of the invoices sent by petitioner had made provision for a discount (Pltf.'s Exs. 2 to 16, R. 37 to 65). In the language of petitioner's president, "no such discounts were allowed to or requested by defendant on these bills and invoices" because, after the O. P. A. came into existence, "it was the uniform custom in the rice industry to neither ask, accept, receive, or give any discount below the ceiling price established by the O. P. A. in connection with

the purchase of rice" (R. 26). On this point respondent's testimony included a statement by its president that he "had delegated the duty of paying the drafts due under the contract to the bookkeeper . . . that (said bookkeeper) did not examine the contract and overlooked the 1% discount in paying the drafts as they were due" (R. 31), and a statement by said bookkeeper that he had never examined the contract, that he had no knowledge of its provisions, and that the president "never instructed me to deduct the 1% discount provided for in the contract" (R. 33).

After the fifteenth and last shipment petitioner sent respondent a final invoice to cover said last shipment (Pltf.'s Ex. 15, R. 63). Respondent at this point refused to pay the amount billed and replied to petitioner with its letter of March 31, 1947 (Pltf.'s Ex. 34, R. 78), complaining therein only of being charged for cases and cartons it had furnished and offering to pay $10,747.78 to terminate the contract if given credit for said cases and cartons. More than a week thereafter, on April 8, 1947, respondent forwarded to petitioner a writing designated as a "Statement of Overcharges" (Pltf.'s Ex. 33, R. 77), again claiming credit therein ($1,210.37) for cases and cartons furnished on the last shipment, claiming $3,200.00 additional credit for alleged overcharges on shipments of rice in November made on and after November 14, 1946, and claiming $805.00 for fumigation charges made by petitioner and paid by respondent on rice shipped in bales and cases, and tendering in settlement at this time to petitioner a check for $6,742.78 (Deft.'s Ex. 6, R. 97), the difference between the amount stated in petitioner's last invoice and the sum of the credits claimed as above.

Petitioner then filed suit for $11,958.15 (R. 1, 2), and thereafter respondent asserted five counterclaims, the first for $560.00 for an overcharge on the November 14th ship-

ment, the second for $2,640.00 for alleged overcharges on November shipments subsequent to November 14th, the third for $805.00 for overcharges for fumigation service on shipments of rice in containers other than pockets, the fourth for $2,223.07 for a 1% discount that it had allegedly omitted to take, and the fifth for $1,210.37 for the cost of cases and cartons furnished by respondent on the last shipment (R. 4 to 8).

In its reply, petitioner denied respondent's affirmative counterclaims, alleging, among other things, that it was the custom of the rice industry to neither ask, accept or receive any discount below the O. P. A. ceiling price and that the contract provided that the seller (petitioner) was not liable for damages for delay incident to strikes and circumstances beyond its control (R. 11 to 13).

The trial court, in finding in favor of petitioner on its claim for $11,958.15 and in favor of petitioner on all of respondent's counterclaims except the first, made the following findings (which are of relevance here):

> "Defendant, at no time prior to the filing of this suit, made any claim to a discount upon the invoice prices, and its failure to claim such discounts was the result of a mutual agreement of the parties that any discount should be waived" (R. 136).
>
> "Defendant has no valid claims against plaintiff for discounts, as provided in the printed provisions of the contract, upon the amounts of the invoices as rendered by plaintiff, for the reason that said provision of the contract was abrogated by mutual agreement of the parties" (R. 138).
>
> "Clause (1) of the printed contract form is a clause inserted for the protection of the seller and does not contemplate a limitation on the delivery specified in the typewritten portions of said contract, and there

is no obligation on the seller to make shipments other than as set out in the typewritten portions of said contract" (R. 138).

"Excepting for the Five Hundred Sixty Dollars ($560.00) overcharge on plaintiff's invoice dated November 18, 1946, for rice shipped to defendant on November 14, 1946, defendant has no claim against plaintiff by reason of payments in excess of the O. P. A. ceiling price, inasmuch as all of the transactions involved in this cause were in the course of trade or business and inasmuch as any other over-ceiling costs to defendant were by mutual agreement or necessitated by Federal Law" (R. 138).

After the trial of this case in the District Court and before respondent completed its appeal, the court reporter died, and the attorneys for the parties agreed on a summary record of the oral evidence that had been presented before the trial court, which summary was used in the Circuit Court of Appeals and is now included in the transcript submitted in conjunction with this petition for certiorari.

On said abbreviated record, the Eighth Circuit Court of Appeals reversed the trial court on all of respondent's counterclaims (except the first, on which the trial court had previously ruled in favor of respondent), holding that petitioner among other things had failed to establish waiver by respondent of its rights to a discount (R. 179) and making no comment whatsoever on the contractual provision exempting petitioner from liability on account of delays in delivery incident to strikes or circumstances beyond its control.

Opinions of Courts Below.

There was no opinion of the trial court in the case here sought to be reviewed. The findings of fact, conclusions

of law, and order for judgment, by the trial court, appear at pages 133-139, inclusive, of the printed transcript of record herewith filed. The judgment entered by the trial court appears at pages 139-140 of the printed transcript of record filed herewith.

The opinion of the United States Court of Appeals, Eighth Circuit, appears at pages 171-185, inclusive, of the printed transcript of record herewith filed. It is not yet reported.

Basis for Jurisdiction.

The basis for this Court's jurisdiction over this proceeding is Section 1254 of Title 28, United States Code, which provides for review by the Supreme Court of the United States of cases in the Courts of Appeals by writ of certiorari.

This petition for review on writ of certiorari has been filed under authority of paragraph 5b of Rule 34 of the Supreme Court of the United States for the reason that the Eighth Circuit Court of Appeals has decided a federal question in a way which conflicts with the applicable decisions of this court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. It is the firm and positive belief of petitioner that said Court of Appeals has violated Rule 52a of the Federal Rules of Civil Procedure which requires that, "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses," and that said Court of Appeals has also violated the principle well established by federal appellate tribunals that if a trial court's judgment is correct, the reviewing appellate court has the duty to affirm regardless of the reason given by the trial court for its ruling.

Questions Presented.

The questions herein presented are two:

1. Did not the Eighth Circuit Court of Appeals violate Rule 52a by not affirming the findings of fact made by the trial court on the question of whether respondent was entitled to a discount, when said findings were supported by the testimony of the petitioner's president (whom the trial court heard and apparently believed) and by all of the relevant documentary evidence pertaining thereto, particularly respondent's own writings of March 31, 1947 and April 8, 1947, when the acts and conduct of respondent at all times during performance under the contract were consistent with said findings, when there is no documentary evidence contrary to said findings, and when only the statements of explanation of respondent's witnesses (which the trial court heard and apparently disbelieved) were consonant with said findings?

2. Did not the Eighth Circuit Court of Appeals violate the principle that if a trial court's judgment is correct, the reviewing appellate court has the duty to affirm regardless of the reason given by the trial court for its ruling in that in the instant case a finding had been made by the trial court in favor of petitioner on the matter of respondent's counterclaim for overcharges for shipments made after November 18, 1946, that the undisputed evidence showed that strikes and circumstances beyond the control of petitioner delayed said shipments, and that there was a clause in the contract exempting the seller (petitioner) from liability for damages arising from failure to make delivery because of strikes and circumstances beyond the seller's control?

Reasons Relied On.

One reason relied on in seeking the issuance of this writ of certiorari is simply that the Eighth Circuit Court of Appeals clearly deviated from the accepted and usual course of judicial proceedings by not affirming the findings of the trial court relating to a discount, which were within petitioner's pleadings, were supported by the testimony of petitioner's president, were further substantiated by all relevant documentary evidence, were not contradicted by any documentary evidence whatsoever, and were in accord entirely with the behavior of both petitioner and respondent during the period of performance under the contract leading to the instant controversy. In not so affirming, said Circuit Court of Appeals disregarded completely the pertinent provision of Rule 52a of the Rules of Civil Procedure as it has been interpreted by this Court and all other federal appellate circuit courts in this nation.

Another reason relied upon is that the Eighth Circuit Court of Appeals, in finding in favor of respondent on respondent's counterclaim premised on rice shipments made after November 18th and thereby reversing the trial court, failed to apply the universally established principle that a judgment, though it be premised on an erroneous finding, will be affirmed if correct and sustainable on another ground. In the instant controversy there was a clause saving petitioner from damages on account of delays in shipment resulting from circumstances beyond petitioner's control. This provision alone, without more and without the possibly erroneous finding that the trial court made, is sufficient to save petitioner and to require affirmance by the Court of Appeals on respondent's said counterclaim in favor of petitioner.

Prayer.

For the purpose of correcting the errors complained of, and to the end that the rights of petitioner may be determined in accordance with the Federal Law in the accepted and usual course of judicial proceedings, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the United States Court of Appeals, Eighth Circuit, commanding it to certify and to send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and proceedings of the said United States Court of Appeals in the within described cause of Miravalle Supply Company, Inc., a corporation, appellant, vs. El Campo Rice Milling Company, a corporation, appellee, No. 14,003, Civil, to the end that the judgment of said United States Court of Appeals, Eighth Circuit, in said cause may be reviewed by this Court, as provided by law, and that your petitioner may have such other relief as to this Court may seem appropriate, and that the judgment of said United States Court of Appeals, Eighth Circuit, may be reversed by this Honorable Court.

EL CAMPO RICE MILLING COMPANY,
a Corporation,

By JOHN S. LEAHY
and
JOSEPH L. BADARACCO,
Counsel for Petitioner.

ROBERTS P. ELAM,
Of Counsel.

SUPPORTING BRIEF.

I.

The result of the judgment pronounced by the Court of Appeals for the Eighth Circuit in this cause is highly unusual in that it is wholly inconsistent with respondent's pretrial letters, which support the findings of the trial court, and it actually awards to respondent $6,227.07 more than respondent's president thought respondent entitled to at the close of the transactions leading to this law suit and $2,223.07 more than respondent actually tendered after due consideration on respondent's president's part as to what it was entitled.

It is of utmost significance to note that, by virtue of respondent's letter of March 31, 1947 (Pltf's. Ex. 34, R. 78) respondent called to petitioner's attention two errors in its last invoice and **acknowledged that it owed petitioner $10,747.78** (the difference between $11,958.15, to which petitioner believed itself entitled, and $1,210.37, the amount of credit claimed by respondent for cases and cartons furnished).

On April 8, 1947 (Pltf's. Ex. 33, R. 77), respondent **acknowledged that it owed petitioner $6,742.78**, a sum arrived at by deducting so-called overcharges of $5,215.37 from the petitioner's last invoice charge of $11,958.15. It tendered said amount to petitioner by check (Deft's. Ex. 6, R. 97).

By virtue of the trial court's findings and judgment (R. 138, 139) petitioner was owed, excluding interest factors for the moment, $11,395.15, the difference between $11,958.15 and $560.00 (the amount of respondent's one counterclaim which was allowed).

Now, by virtue of the judgment entered by the Eighth Circuit Court of Appeals (R. 187) **petitioner is awarded $4,519.71,** the difference between $11,958.15 and the total of all of respondent's counterclaims.

Respondent then, contrary to usual custom where a party claims more than is his just due and instead of having to pay $10,747.78 which it was willing to do or $6,742.7[illegible] which it actually offered, is now required to pay only $4,519.71 according to the judgment directed by the Eighth Circuit Court of Appeals. Such a strange trend of events, particularly when the trial court believed petitioner entitled to $11,398.15 and made findings to support said judgment, could occur only if the record did not substantially support the findings or if the appellate court failed to defer to said findings when it should have done so. We submit, and shall demonstrate, that the latter reason and not the former created this unusual result.

The foregoing obviously leads to a further development —that the Court of Appeals violated the well established legal principles that an appellate court must accept as correct the findings of a trial court if said findings are supported by substantial competent evidence, and that it must defer to the opportunity of the trial judge, sitting as a jury, to judge the credibility of the witnesses.

Authorities in support of these propositions are plentiful. In the first place, Rule 52 (a) of the Rules of Civil Procedure provides in part:

> "Findings of fact shall not be set aside [in actions tried without a jury] unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In Cleo Syrup Corporation v. Coca-Cola Co., 139 Fed. (2d) 416, 417, 150 A. L. R. 1056, it was stated:

". . . The District Court, which was the trier of the facts, has determined that issue in favor of the plaintiff. This Court, upon review, will not retry issues of fact or substitute its judgment with respect to such issues for that of the trial court. Storley v. Armour & Co., 8 Cir., 107 F. 2d 499, 513; Gasifier Mfg. Co. v. General Motors Corporation, 8 Cir., 138 F. 2d 197, 199; Travelers Mut. Casualty Co. v. Rector, 8 Cir., 138 F. 2d 396, 398. The power of a trial court to decide doubtful issues of fact is not limited to deciding them correctly. Thompson v. Terminal Shares, Inc., 8 Cir., 89 F. 2d 652, 655; Pittsburgh Plate Glass Co. v. National Labor Relations Board, 8 Cir., 113 F. 2d 698, 701 (affirmed 313 U. S. 146, 61 S. Ct. 908, 85 L. Ed. 1251); Travelers Mutual Casualty Co. v. Rector, supra. **In a non-jury case, this Court may not set aside a finding of fact of a trial court unless there is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was induced by an erroneous view of the law.** Aetna Life Ins. Co. v. Kepler, 8 Cir., 116 F. 2d 1, 4, 5; Gasifier Mfg. Co. v. General Motors Corporation, 8 Cir., 138 F. 2d 197, 199; Travelers Mutual Casualty Co. v. Rector, supra . . ." (Emphasis supplied.)

Moreover, Federal Savings & Loan Insurance Corporation v. First National Bank, Liberty, Missouri, 164 F. 2d 929, 932, holds:

"Certainly, **if the findings of the court are sustained by substantial evidence, the judgment appealed from should be affirmed.** These findings are presumptively correct and must be sustained unless clearly erroneous. Rule 52 (a), Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c; Dumas v. King, 8 Cir., 157 F. 2d 463; Kincade v. Mikles, 8 Cir., 144 F. 2d 784. We are not at liberty to substitute our judg-

ment for that of the trial court and on appeal that view of the evidence must be taken which is most favorable to the prevailing party, and if, when so viewed, the findings are supported by substantial competent evidence they should be sustained." (Emphasis supplied.)

Other Eighth Circuit cases approving the same principle are Chicago, B. & Q. Railway Company v. Fyre-Bruhn Company, 184 Fed. 15, 106 C. C. A. 217; Grouf v. State National Bank of St. Louis, 40 Fed. 2nd 2, 5; and Wellston Trust Company of St. Louis, Mo., v. Snyder, 87 F. 2nd, l. c. 46. Cases from all other Federal Courts of Appeals to like effect are: Massachusetts Protective Assn., Inc., v. U. S. (CCA 1), 114 F. 2d 304, 309; U. S. v. Aluminum Co. of America (CCA 2), 148 F. 2nd 416, 433; Art Metal Const., etc., v. Lehigh Structural Steel Co. (CCA 3), 126 F. 2d 134, 135; Union Bleachery v. U. S. (CCA 4), 79 F. 2d 549, 550, 102 A. L. R. 204; Sundt v. Turman Oil Co. (CCA 5), 107 F. 2d 762, 764; Reynolds Metals Co. v. Skinner (CCA 6), 166 F. 2d 66, 76; Fleming v. Pantzer Lumber Co. (CCA 7), 162 F. 2d 276, 279; Blackmer v. McDermott (CCA 9), 176 F. 2d 498, 502; Paramount Pest Control Service v. Brewer (CCA 10), 177 F. 2d 504, 507.

It may be contended that the case of U. S. v. U. S. Gypsum, 333 U. S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746, 766, has so glossed said Rule 52 (a) that an appellate court may now weigh evidence and thereby make a finding contrary to that of the trial court. But this is only so, as the Gypsum case held, when a trial court's finding is "clearly erroneous" and this occurs "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." In this cited case the reviewing court did reverse the trial court

even though the trial court's findings were amply supported by the oral testimony of defense witnesses, but it is to be noted that the government's evidence was mainly documentary and said documentary evidence not only failed to support said oral testimony, but was contradictory thereto. Consequently, the reviewing court could certainly derive a definite and firm conviction from examining the entire evidence that a mistake had been committed. Not so, however, in the instant case where all documentary evidence clearly and undisputably supported the findings made by the trial court on the matter of a discount and was contrary to the view adopted by the Eighth Circuit Court of Appeals. This will be more fully demonstrated hereinafter.

Regarding the credibility of witnesses, Shaw v. Hamilton, 346 Mo. 366, 141 S. W. 2d 817, 823, recited:

> ". . . The credibility of all of the witnesses and the weight and value to be given their testimony is very important in this case. We have before us only the cold record; much of it is in narrative form, with questions and answers omitted. **The trial court had an opportunity to see and hear the witnesses, observe their attitudes and capacities, and disposition to tell the truth.** These matters are not necessarily reflected in the record and for that reason weight must be given to the findings of this court. The trial court had a better opportunity to determine the weight and value of the oral testimony." (Emphasis supplied.)

Snapp Hotel and Realty Co. v. Elbert et al. (8 Cir.), 108 F. 2d 661, 664, recited:

> "All these questions were considered by the trial court, sitting as a jury, and were resolved in favor of the appellees. It may freely be conceded that this is a close case, but it is to be remembered that, in

all actions tried upon the facts without a jury, **due regard must be given to the opportunity of the trial court to judge of the credibility of the witnesses, and that findings of fact** shall not be set aside unless clearly erroneous." (Emphasis supplied.)

Cases from many other federal appellate tribunals holding likewise follow: Camden Woolen Co. v. Eastern S. S. Lines (CCA 1), 12 F. 2d 917, 919; DeNicolo v. Palmer (CCA 2), 125 F. 2d 126, 127; Conn v. Roos (CCA 5), 14 F. 2d 64, 71; Turner v. Schaeffer (CCA 6), 249 F. 654, 656, 161 CCA 564; Adair v. Shallenberger (CCA 7), 119 F. 2d 1017, 1019; Ashton v. Sentney (CCA 9), 145 F. 2d 719, 720; National Mut. Casualty Co. of Tulsa, Okla., v. Eisenhower (CCA 10), 116 F. 2d 891, 894.

Applying said formulae to the instant controversy, taking up first respondent's counterclaim by virtue of which it claims a 1% discount, the following is apparent. R. H. Hancock, president of the petitioner, testified as follows (R. 26):

"Plaintiff's Exhibit No. 1 contains a provision relating to a one per cent discount to be allowed for payment of draft within ten days of its date. **No such discounts were allowed to or requested by defendant** on these bills and invoices, about which I have been testifying, because the contract was a printed form in use in the rice industry long before the O. P. A. came into existence, and, after the O. P. A. came into existence, it was the **uniform custom in the rice industry to neither ask, accept, receive or give any discount below the ceiling price** established by the O. P. A. in connection with the purchase of rice." (Emphasis supplied.)

On this same point, Louis Miravalle, president of respondent, stated (R. 31):

"That under the terms of the contract, Paragraph 8, a 1% discount was to be allowed buyer for payment of drafts within 10 days of their date; that I consider that there is due defendant under the 1% discount clause $2,223.07; that the transactions between plaintiff and defendant spanned a period of time of approximately 6 months; that this witness as President of the defendant corporation had delegated the duty of paying the drafts due under the contract to the bookkeeper, Joseph Erger; that Joseph Erger did not examine the contract and overlooked the 1% discount in paying the drafts as they were due; that this omission was discovered only when the controversy arose between plaintiff and defendant; that the plaintiff never at any time called his attention to the provision of the contract relating to the 1% discount;"

Joseph Erger, bookkeeper for respondent, stated (R. 33):

"that I have never examined the contract here in issue; that I have no knowledge of its provisions; that Mr. Louis Miravalle, President of the defendant corporation, has never instructed me to deduct the 1% discount provided for in the contract or the fumigation charges invoiced by plaintiff from any amount paid by defendant to plaintiff; that I, on April 8th, 1947, at the direction of Mr. Louis Miravalle, President of defendant corporation, prepared a check in the amount of $6,742.78, Defendant's Exhibit Number 6, which was subsequently signed by Mr. Louis Miravalle for and on behalf of the defendant corporation and made payable to plaintiff corporation; that said amount was arrived at by subtracting the sum of $5,215.37 from the sum of $11,958.15; that the figure of $11,958.15 was the sum

claimed by plaintiff to be due and owing it as of April 5th, 1947, Plaintiff's Exhibit Number 15; that the sum of $5,215.37 was the sum of adjustments claimed by defendant corporation to be due it; that the said check was subsequently returned by plaintiff corporation uncashed."

Besides this oral testimony the record also discloses that the contract was prepared on a form of The Rice Millers' Association, copyrighted in 1937 and before the Office of Price Administration was established (Pltfs. Ex. 1, R. 35). Its printed clause #8 provided "Terms of Payment: Draft with order notify Bill of Lading attached, seller's order notify buyer. One per cent discount to be allowed for payment of draft within ten days of its date, otherwise net cash." The contract in question was executed at a time when price ceilings were in effect, and when shortages, as in other commodities, were the rule. That it was in short supply and difficult to obtain is borne out by the testimony of R. H. Hancock (R. 27), by various exhibits indicating that respondent was willing to take any variety of rice in any kind of container in place of the hard to obtain Texas Patna in pockets called for in the contract (Pltfs. Exs. 17, 26, R. 67, 73), and by respondent's admission in its appellate brief.

It may be noted also that none of the petitioner's invoices (Pltfs. Exs. 2-16, R. 37-65) accompanying shipments of rice provided for a 1% discount and that **respondent**, although it complained several times in its letters for other reasons (Pltfs. Exs. 19, 34, R. 68, 78, and Defts. Ex. 16, R. 128) and paid occasionally under protest for other reasons (Pltfs. Ex. 32, R. 76), **never once, during the six month period of shipments, suggested that it was entitled to a discount.** (See all Exhibits.)

Moreover, and most significantly, Plaintiff's Exhibits 33 and 34 (R. 77, 78) and Defendant's Exhibit 6 (R. 97),

indicate that **not even respondent's president, who prepared these after all shipments had been received, believed respondent was entitled to a discount.** Exhibit 34 recited:

"Louis Miravalle, President Phone: CEntral 1390
Miravalle Supply Company, Inc.
Rice and Grain Products
9 Rutger Street
St. Louis 4, Mo.
March 31, 1947

El Campo Rice Milling Company,
El Campo, Texas.

Gentlemen:

We are returning herewith invoice of the Texas-West Indies Company and request that since this rice is a delivery against and also terminates the El Campo contract that it be billed by El Campo Rice Milling Company, the same as was done on a lot covered by your invoice #9907.

In preparing the invoice allow credit for cartons and cases on the same basis shown on invoice #9907. You will also find that 30/1# Prolific figures $3.045 per case instead of $3.50.

Settlement will be made upon receipt of proper invoice.

Yours very truly,

Miravalle Supply Company, Inc.,
Louis Miravalle."

(Emphasis supplied.)

Exhibit 33, though purporting to be a carefully drawn statement of the credits claimed by respondent, said noth-

ing about a discount. On the basis of this computation, respondent's check for $6,742.78 (Defts. Ex. 6, R. 97) was tendered. Said check exceeded the amount adjudged by the Circuit Court of Appeals to be proper by $2,223.07. Respondent first raised the question of a discount when it so pleaded in its answer to petitioner's complaint filed in this cause.

The findings on the question of a discount made by the trial court were as follows (R. 136, 138):

> "Defendant, at no time prior to the filing of this suit, made any claim to a discount upon the invoice prices, and its failure to claim such discounts was the result of a mutual agreement of the parties that any discount should be waived."
>
> "Defendant has no valid claims against plaintiff for discounts, as provided in the printed provisions of the contract, upon the amounts of the invoices as rendered by plaintiff for the reason that said provision of the contract was abrogated by mutual agreement of the parties."

Analyzing the evidence referred to above, just what part thereof, if any, does not substantiate the findings of the trial court? Only the oral testimony of respondent's two witnesses, we submit, which testimony appears to be contradictory of the whole course of respondent's conduct before the trial. None of the documentary evidence is contrary to the findings of the trial court. On the contrary, all of it supports said findings.

Consider the circumstances surrounding the execution of this contract. Ceiling prices were in effect. Rice supplies were short incident to a war. Millers could find as many customers as they desired who would buy at ceiling prices. Would petitioner have contracted under these circumstances to sell rice under the ceiling permitted

him? Was it necessary for petitioner to give a discount to assure itself of prompt payment when it could have refused to sell to buyers that were slow in paying and could have sold to many other rice supply companies that were begging for rice?

True, the printed form on which the contract was prepared provided for a 1% discount. But it was a form that had been in use long before ceiling prices were established. It was appropriate for rice sales in an uncontrolled market when any price could be asked and an inducement for prompt payment was common and desirable. R. H. Hancock testified as above regarding the printed form and related that discounts were not being asked, accepted, received, or given during these times although it was provided for on an obsolete form still being used. The trial court saw said witness and heard and believed his testimony.

There were fifteen separate shipments under this contract made over a period of seven months. None of petitioner's invoices provided for a discount. Never did respondent complain of this fact. The trial court heard the testimony of respondent's witnesses to the effect that a lack of understanding between said witnesses was the reason that a discount had not been taken or asked for. Apparently the trial judge, who saw and heard these witnesses, did not believe this explanation. And it is natural that he should have done so. For the record showed that respondent's president was not adverse to making complaints but that he made none concerning a discount. It showed also that on March 31, 1947, respondent's president, with full knowledge concerning at least the last invoice, wherein there was no discount provided for, was ready to pay petitioner $10,747.78 on the contract and that he, though he knew of the presence of the discount provision in the contract, then did not ask for a discount

or complain of the fact that the last invoice did not provide for a discount or of never having been allowed a discount on other shipments. It further showed that on April 8, 1947 after time for further deliberation by its officers, respondent caused to be prepared a statement and a check signed by its president, which writings, we submit, surely required collaboration between respondent's president and bookkeeper in its preparation. **The statement recited the various credits claimed by respondent, but nowhere therein is there a claim for a discount.** At this same time respondent tendered petitioner $6,742.73 and in so doing did not claim a discount. Is it any wonder that the trial court found as it did? Does not all of the documentary evidence referred to above substantially and competently support the findings of the trial court? Under the circumstances it is inconceivable how the Court of Appeals could have reversed the trial court on this point.

The opinion of the Court of Appeals suggests that the parties originally intended the discount provision to be binding and that petitioner attempted to establish waiver on the part of respondent to its rights thereunder (R. 179). Said opinion states this in spite of the fact that neither waiver nor estoppel were pleaded by petitioner. Petitioner never tried to establish waiver for, under petitioner's theory, such was unnecessary. It is, and has been the contention of petitioner that both parties had agreed from the outset (see Pltfs. Reply, R. 12, 13) that this provision was not to be effective. The trial court found this to be the case (R. 36).

Surely the testimony of petitioner's president sustains this theory (R. 26). So also does all of the documentary evidence, including the writings of respondent dated March 31 and April 8, 1947. Moreover these writings taken alone without considering oral testimony repudiate the explanations of respondent's witnesses.

To summarize finally, the record demonstrates the correctness of the opinion and judgment of the trial court:

First: By the testimony of the parties;

Second: By their conduct throughout the performance of the contract over a period of six months;

Third: By all of the writings passing between the parties;

Fourth: By the conduct of the respondent in paying fourteen drafts and not suggesting its right to a discount.

Fifth: By reason of the fact that after all of the shipments had been made and received and after the controversy arose between the parties as to the charge for cartons, no mention was ever made by either party that respondent was entitled to a discount of one per cent;

Sixth: By the amount of the tender by respondent before suit was instituted, which showed no claim for discount, and the irresistible conclusion that if a conflict did exist, the minimum of the admitted amount would have been tendered; and

Seventh: By the incredible evidence of respondent's president's testimony that he had not informed his bookkeeper that respondent was entitled to a discount even though he surely approved the statement of overcharges of April 8, 1947 and must have noted the absence of a claim for a discount.

We submit that since the findings of the trial court are amply supported by substantial competent evidence, documentary and otherwise, and since the testimony of R. H. Hancock, which substantiates the findings of the trial court, was presumably believed by the trial court whereas the oral testimony adduced by respondent was presumably disbelieved, the Court of Appeals should have affirmed the trial court's findings respecting discount, and,

in not doing so, failed to defer to the trial court's findings in these respects. Consequently, reversal of the judgment in favor of petitioner on respondent's counterclaim for a discount by the Court of Appeals is erroneous and completely without foundation.

II.

Among the typewritten insertions, the contract provided (Pltfs. Ex. 1, R. 35), under Time of Shipment as follows: "2,000 pkts. October, 1946, 5,000 pkts. each November, December, 1946, January, February, 1947." It also provided: "Ceiling price at time of shipment f. o. b. El Campo. Shipping instructions to be furnished by buyer." Printed clause number (1) recited: "The buyer agrees to furnish in writing complete shipping instructions to the seller at least five full business days before the date each shipment is required to be made."

Although respondent's president in his telegram to petitioner on October 26, 1946 (Pltfs. Ex. 18, R. 67 and Defts. Ex. 1, R. 78), requested that petitioner ship 5,000 pockets (500,000 lbs.) of Patna for November between November 1 and November 7, petitioner shipped 1,600 cases (80,000 lbs.) on November 7, 1,600 cases (80,000 lbs.) on November 14, 2,700 bales (162,000 lbs.) on November 25, 1,350 bales (81,000 lbs.) on November 29, 1,600 cases (80,000 lbs.) on November 30. (Pltfs. Exs. 4-8, R. 41-49). All of said rice shipped during November was Patna except the November 30 lot (Pltfs. Ex. 8, R. 49). By letter dated October 14, 1946 (Pltfs. Ex. 17, R. 67), respondent's president agreed that petitioner could ship rice in containers other than pockets. By telegram dated November 25, 1946 (Pltfs. Ex. 26, R. 73), respondent agreed to accept any variety of rice except Pearl in any kind of container.

On November 14, 1946, the ceiling price of rice was increased. Petitioner had charged respondent and was paid the price prevailing at the time of shipment—$10.60 per hundred weight instead of $9.90 for Patna. Respondent, in its counterclaims for the difference it had paid, contended that all rice shipped in November should be priced at $9.90 (R. 5, 6) since it had directed petitioner, by its telegram of October 26, 1946, to ship the November lot between November 1 and November 7 (Pltfs. Ex. 18, R. 67). The trial court found in favor of petitioner for the reason set out below (except for the November 14 shipment which the court believed should have been priced on the $9.90 basis) and the Court of Appeals reversed this counterclaim in favor of respondent.

Circumstances surrounding the execution of the contract involved herein again become important and were set out partially under Point I, supra. As was shown therein, rice was very scarce and hard to obtain incident to the existing war (Pltfs. Exs. 21, 25, R. 69, 72). Respondent's president acknowledged this fact by acceding to changes in the variety of rice to be delivered and in the form to be delivered (Pltfs. Exs. 17, 26, R. 67, 73). Government demands made rice, like other products, a scarce commodity. A flourishing black market, incident to said shortage and price controls, caused petitioner's sources of supply to be further decimated. Petitioner's president, by his letter of October 26, 1946 (Pltfs. Ex. 21, R. 69), pointed out that a certain River Rice Company had bought 10,000 sacks of "our best Patna" and had paid 50¢ above ceiling and that elsewhere in Texas as much as $1.00 over ceiling was being paid. Respondent, in its brief in the Court of Appeals, by distorting the meaning of this letter, suggests that the true reason for delayed shipments was "that plaintiff obviously desired to obtain as much money as possible for its products, in spite of the regulations of the O. P. A." We submit that

if petitioner was selling its products in the black market to the detriment of its bona fide buyers, it would not be so indiscreet as to boast of or even mention said fact to respondent and others who would thereby have been wronged. When referring to "our best Patna", petitioner's president was speaking of the variety of rice known as Texas Patna (see Sec. 9 of Deft. Ex. 2, R. 81, and Defts. Exs. 3, 4 and 5, R. 91, 93, 95), not his own Company's product.

In addition to the above undisputed evidence relating to the difficulty of obtaining rice, petitioner's president further testified (R. 26):

> "Following the execution of the contract dated October 5, 1946, which has been marked 'Plaintiff's Exhibit 1,' it was extremely difficult to obtain rice. This was due to maritime strikes in the Gulf ports, and other untoward market conditions . . ."

Petitioner's letter of November 25, 1946 (Pltfs. Ex. 25, R. 72) further advised respondent of the difficulty of obtaining rice. All of this evidence was also undisputed.

On the above evidence, the trial court found (R. 138):

> "Clause (1) of the printed contract form is a clause inserted for the protection of the seller and does not contemplate a limitation on the delivery specified in the typewritten portions of said contract, and there is no obligation on the seller to make shipments other than as set out on the typewritten portions of said contract."

We must agree with the Court of Appeals that the above finding may be erroneous. However, we further submit, and so argued in our appellate brief, that clause 5 of the contract applied. Said clause reads as follows (Pltf's. Ex. 1, R. 35):

> "Liability: The seller shall not be liable for damages arising from his failure to make delivery caused by strikes, postponement or suspension in sailing of steamers, or any circumstances or accident beyond his control."

The Court of Appeals, although it gave literal effect to all other provisions of the contract favoring respondent's views, made no comment whatsoever regarding this last quoted clause, completely disregarding it in its opinion except where it set out the contract in its entirety (R. 171-184).

We submit that the consideration of said clause with the undisputed evidence heretofore recited saves petitioner from any liability incident to November shipments and entitled it to charge, as it actually did, the ceiling price prevailing at the time of shipment.

We further submit that the trial court was correct in ruling in favor of petitioner on this counterclaim of respondent for $2,640.00 even if its asserted reason was not germane. It is an accepted doctrine that if a trial court's judgment is correct, the reviewing appellate court has the duty to affirm regardless of the reason given by the trial court for its ruling.

In Helvering v. Gowran, 302 U. S. 238, 245, 82 L. Ed. 224, 230, 58 S. Ct. 154, this Court held:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason [numerous citations follow]."

In Walling v. Friend (8 Cir.), 156 F. 2d 429, 431, it was stated:

". . . Recognizing our duty to sustain a judgment if it is the proper one, even though the trial court assigns an improper reason for entering it, we consider these questions. J. E. Riley Investment Co. v. Commissioner of Internal Revenue, 311 U. S. 55, 61 S. Ct. 95, 85 L. Ed. 36; McGivern v. Northern Pacific R. Co., 8 Cir., 132 F. 2d 213."

And Springfield v. Carter (8 Cir.), 175 F. 2d 914, 917, states:

". . . Even without such agreement we are not limited to the reasons given by the trial court for his decision. If the judgment is correct, our duty is to affirm regardless of the reason given by the trial court for his ruling. Walling v. Friend, 8 Cir., 156 F. 2d 429, 431; Iselin v. C. W. Hunter Co., 5 Cir., 173 F. 2d 388."

Further authority for the above proposition from all other federal appellate courts may be found in Brownell v. Tide Water Associated Oil Co. (C. C. A. 1), 121 F. 2d 239, 241; U. S. ex rel. Johnson v. Morley Const. Co. et al. (C. C. A. 2), 98 F. 2d 781, 787; Lanova Corp. et al. v. National Supply Co. (C. C. A. 3), 116 F. 2d 235, 239; Knotts v. First Carolinas Joint Stock Land Bank of Columbia (C. C. A. 4), 86 F. 2d 551; Iselin et al. v. C. W. Hunter Co. (C. C. A. 5), 173 F. 2d 388, 390; In re Barlum Realty Co. (C. C. A. 6), 154 F. 2d 562, 566; Reconstruction Finance Corp. v. Goldberg (C. C. A. 7), 143 F. 2d 752, 756; Petersen v. Coast Cigarette Vendors (C. C. A. 9), 131 F. 2d 389, 391; Jay v. Chicago Bridge & Iron Co. (C. C. A. 10), 150 F. 2d 247, 249.

For the reasons set out, supra, we believe that the trial court's judgment in not allowing respondent's counterclaim for $2,640.00 was correct, even if the reason for said

finding was misnamed, and that said judgment should be affirmed.

In order to amend a state of affairs that is wholly unjust to petitioner and to correct the failure of the Eighth Circuit Court of Appeals to apply the mandatory legal principles described fully hereinbefore, this petitioner respectfully and earnestly exhorts this Honorable Court to grant a writ of certiorari and to rehear the matters complained of above.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. .....

EL CAMPO RICE MILLING COMPANY, a Corporation,
Petitioner,

vs.

MIRAVALLE SUPPLY COMPANY, INC., a Corporation,
Respondent.

RESPONDENT'S BRIEF OPPOSING ISSUANCE OF WRIT OF CERTIORARI.

OPINION OF COURT BELOW.

The case herein sought to be reviewed was decided by the United States Court of Appeals for the Eighth Circuit and was there entitled Miravalle Supply Company, Inc., a Corporation, Appellant, v. El Campo Rice Milling Company, a Corporation, Respondent, No. 14003. The decision and rulings of the Court below appear at pages 170-184 of the record.

The decision is reported in 181 F. 2d 679.

JURISDICTION OF THIS COURT.

Respondent concedes that this Court has jurisdiction to review this case under Title 28, U. S. C., Sec. 1254, but Respondent denies that the Court of Appeals for the Eighth Circuit has decided a federal question in a way which conflicts with the applicable decisions of this Court or has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The District Court of the United States for the Eastern District of Missouri acquired jurisdiction of this case by reason of the diversity of citizenship of the parties (Record p. 137).

SUMMARY OF THE ARGUMENT.

I.

Since Petitioner has limited the issues in its Petition for certiorari to two, Respondent will limit itself to answering these two points and will assume that all other issues have been abandoned by Petitioner.

Rule 38, Sec. 2, Rules of the Supreme Court of the United States.

II.

Although Respondent admits that under Rule 52 (a) of the Federal Rules of Civil Procedure the United States Court of Appeals is bound to give due consideration to findings of the Trial Court, and not set aside such findings unless they are clearly erroneous, Respondent emphasizes that an Appellate Court is free to interpret the law of a case according to its independent judgment.

U. S. v. Wholesale Oil Co., C. C. A. (Kan.), 154 F. 2d 745;

Campana Corp. v. Harrison, C. C. A. (Ill.), 114 F. 2d 400;

Sbicca-Del Mac, Inc., v. Milius Shoe Co., C. C. A. (Mo.), 145 F. 2d 389;

Kell v. Gross, C. C. A. (Tex.), 171 F. 2d 715.

The United States Court of Appeals found for Respondent as a matter of law in reversing the judgment of the Trial Court on the issue of waiver by Respondent of its right to a discount under the contract in evidence and in so doing the United States Court of Appeals properly followed Missouri substantive law.

Mitchell v. Amer. Med. Assn. (Mo. App.), 46 S. W. 2d 231, 237;

Doerr v. Nat. Fire Ins. Co. (Mo. Sup.), 285 S. W. 961, 964, 54 A. L. R. 1336.

Petitioner was in no position to urge defense of waiver or estoppel on the United States Court of Appeals, for these defenses were not pleaded.

Rule 8 (c), Federal Rules of Civil Procedure.

III.

Petitioner is in no position to rely on the rule that an Appellate Court must affirm a judgment of the Court below even though Court below used erroneous reasoning in reaching its judgment, for the reason that the question of contract interpretation is one of law which the United States Court of Appeals may independently decide and for the further reason that there was no finding of fact by the District Court upon which Petitioner's defense of impossibility could be predicated by the Appellate Court and no objection to the District Court's findings was made by Petitioner.

Crosley Radio Corp. v. Dart, C. C. A. (Mich.), 160 F. 2d 426;

Kennedy v. U. S., C. C. A. 9, 1940, 115 F. 2d 624;

Abbot ex rel. Buice v. Patterson, C. C. A. (Mass.), 1946, 155 F. 2d 429, cert. den. 67 S. Ct. 83, 329 U. S. 739, 91 L. Ed. 638;

Smith, Kline & French Laboratories v. Clark & Clark, C. C. A. (N. J.) 1946, 157 F. 2d 725, cert. den. 67 S. Ct. 482, 329 U. S. 796, 91 L. Ed. 681.

IV.

Petitioner made no submissible case under Missouri substantive law on its theory of impossibility and for that reason the Trial Court could not have found facts now contended for by Petitioner.

Eaton v. J. R. Crowe Coal & Mining Co., 142 S. W. 1107, 161 Mo. App. 30.

ARGUMENT.

I.

Although the United States Court of Appeals for the Eighth Circuit reversed in favor of Respondent the judgment of the District Court as to all Respondent's counterclaims (pp. 183-184, Record), Respondent will limit the argument in this brief to the two questions set out in the Petition for Certiorari (p. 9, Pet. for Cert.). Since Rule 38, Sec. 2, of the Rules of this Court prescribes that all questions to be considered by this Court must be specifically brought forward by the Petition for Certiorari, Respondent will treat all other questions as abandoned.

II.

Petitioner alleges in its first question presented (p. 9, Pet. for Cert.) that the United States Court of Appeals failed to give due regard to the opportunity of the Trial Court to judge the credibility of the witnesses, as required by Rule 52 (a) of the Federal Rules of Civil Procedure. Petitioner further alleges that the United States Court of Appeals set aside findings of fact of the District Court that are not "clearly erroneous," the standard laid down by the Rule 52 (a).

Respondent emphasizes that while there can be no question but that an Appellate Court is bound by the findings of fact of a Trial Court if there be substantial evidence to support the findings, an Appellate Court is free to interpret the law of the case according to its independent judgment. This rule has been laid down many times by various Federal Courts.

U. S. v. Wholesale Oil Co., C. C. A. (Kan.), 154 F. 2d 745;

Campana Corp. v. Harrison, C. C. A. (Ill.), 114 F. 2d 400;

Sbica-Del Mac, Inc., v. Milius Shoe Co., C. C. A. (Mo.), 145 F. 2d 389;

Kell v. Gross, C. C. A. (Tex.), 171 F. 2d 715.

It is to be emphasized that the United States Court of Appeals directed judgment in favor of Respondent **as a matter of law.**

Even assuming that the evidence mentioned by Petitioner (pp. 12-24, Pet. for Cert.) is sufficient to sustain the finding by the Trial Court that the discount had been waived by Respondent (Record, Findings of Fact, par. 9, p. 136, and Conclusions of Law, par. 7, p. 138), the substantive law of Missouri which governs this case (Opinion of the United States Court of Appeals, Record, p. 175) demands that where substantial rights are involved a waiver must be supported by a consideration to be valid (Opinion, Record, p. 180).

Mitchell v. Amer. Med. Assn. (Mo. App.), 46 S. W. (2) 231, 237;

Doerr v. Nat. Fire Ins. Co. (Mo. Sup.), 285 S. W. 961, 964, 54 A. L. R. 1336.

It is admitted that there was no consideration for a waiver, and hence Respondent is entitled to prevail as a matter of law.

It may further be noted that neither waiver nor estoppel is pleaded by Petitioner in its complaint (Record, pp. 1-2) or in its reply (pp. 11-13), although this is specifically required by Rule 8 (c) of the Federal Rules of Civil Procedure.

It is manifest, therefore, that the many citations of Petitioner, set out on pages 13-17 of its Petition for Certiorari, are not in point.

III.

Petitioner in its second point (p. 9, Pet. for Cert.) relies heavily on the principle that an Appellate Court must affirm the judgment of the Court below if that judgment is right even though the Trial Court may have employed erroneous reasoning in arriving at its judgment. With this principle there can, of course, be no quarrel, but Respondent emphasizes that Petitioner is in no position to call on this principle in the present state of the record.

The Trial Court based its findings in rendering judgment against Respondent's counterclaim on the theory that Petitioner was not under any contractual obligation to ship rice after having received five days' notice from the Respondent buyer (Conclusions of Law, Record, par. 4, p. 138). The United States Court of Appeals found that under its interpretation of the law Petitioner **was** under an obligation to ship after having received five days' notice, and the judgment was accordingly reversed (Opinion, pp. 176-177, Record).

There can be no question but that the construction of a contract is within the competence of the United States Court of Appeals.

> Crosley Radio Corp. v. Dart, C. C. A. (Mich.), 160 F. 2d 426.

After the findings of fact had been handed down by the Trial Court and judgment entered accordingly, Respondent filed a motion to amend the findings and more particularly the findings dealing with the interpretation of the contract. (Motion of Defendant to Amend Findings of Fact and Conclusions of Law, p. 151, Record.) This motion, together with Respondent's motion for a new trial, was overruled (p. 153, Record) and Respondent then pursued its appeal.

Let it be noticed that **there was no finding of fact nor conclusion of law by the District Court to the effect that it was impossible for Petitioner to fulfill its contractual obligations.** Nor did Petitioner file any objections to the findings of the District Court nor move the District Court to amend its findings to include facts upon which a defense of impossibility might be predicated.

It is clear that in this state of the record, the United States Court of Appeals could not review this defense, for there is no finding of fact in the Trial Court's findings to warrant the United States Court of Appeals in making a specific finding of fact favorable to Appellee.

This rule has been laid down in Kennedy v. U. S., C. C. A. 9, 1940, 115 F. 2d 624, wherein a United States Court of Appeals denied a motion of an appellee asking that the District Court be required to make a specified finding of fact favorable to appellee where there was no showing that appellee ever applied to the District Court for an amendment of its findings.

It has been held that in a habeas corpus proceeding a United States Court of Appeals cannot set aside the District Court's disposition of the case wherein the District Court makes no finding of fact, unless the United States Court of Appeals can find no reasonable basis for the decision anywhere in the record. Abbot ex rel. Buice v. Patterson, C. C. A. (Mass.), 1946, 155 F. 2d 429, cert. den., 67 S. Ct. 83, 329 U. S. 739, 91 L. Ed. 638.

It has further been held that proceedings in habeas corpus are subject to Rule 52 (a) (b) of the Federal Rules of Civil Procedure. Farrell v. Lanagan, C. C. A. 1st, 1948, 166 F. 2d 845, certiorari denied 68 S. Ct. 1509, 334 U. S. 853, 92 L. Ed. 1775; Davis v. Johnston, C. C. A. 9th, 1946,

157 F. 2d 64, certiorari denied 67 S. Ct. 1197, 331 U. S. 813, 91 L. Ed. 1832.

How can Petitioner now complain because the United States Court of Appeals refused to set aside the District Court's failure to find for Petitioner on the ground of impossibility of performance?

A further pronouncement of the rule applicable here is to be found in Smith, Kline & French Laboratories v. Clark & Clark, C. C. A. (N. J.), 1946, 157 F. 2d 725, cert. den., 67 S. Ct. 482, 329 U. S. 796, 91 L. Ed. 681, wherein it was held that the facts on which a legal defense is to be based must be found by the Court below or else the issue raised by the facts is not properly before the Appellate Court.

Thus it is clear that while an Appellate Court is free to apply any legal theory in affirming a judgment of a Court below, the Appellate Court may not predicate such a theory on facts not found by the Trial Court and set out in the record. Petitioner's citations set out on pp. 28-29 of the Petition for Certiorari are not in point.

IV.

It may further be noticed that the Petitioner made no submissible case on its theory of impossibility and for that reason there could be no finding by the District Court favorable to it on that issue.

The entire evidence in the Record on this point is as follows: Appellee's officer testified (p. 27, Record) that following the execution of the contract it was extremely difficult to obtain rice and that this was due to maritime strikes in the Gulf Ports and other untoward market conditions. Plaintiff's Exhibit 21 (pp. 69-70, Record) and

Plaintiff's Exhibit 25 (pp. 72-73, Record) further mention the reasons for Appellee's failure to ship.

Appellant readily admits that it was difficult for Appellee to obtain rice, but maintains that Appellee is not to be excused from liability on this ground. It must be borne in mind that it is not sufficient in law to show hardship or difficulty as a defense. A case of **impossibility** must be made out. Appellee has not brought itself within this rule. Indeed, Appellee's own evidence clearly demonstrates that it was not **impossible** for Appellee to deliver the rice on time as provided by the contract.

Plaintiff's own Exhibit 21 (p. 69, Record) clearly demonstrates why it did not deliver the rice on time:

> "Within the last few days the River Rice Company has bought 10,000 sacks of our best Patna, paying 50¢ above ceiling, and we do not know what we can do about this. I understand in some parts of Texas they are paying as much as $1.00 above ceiling, and all we are trying to do now is get enough rice to fill our orders. If this keeps up we are going to have to take a loss on your transaction. * * *"

It is evident that rice could have been supplied Appellant but that Appellee could and did get more money in other places and for that reason refused to perform its contract.

Plaintiff's Exhibit 25 (pp. 72-73, Record) contains this enlightening bit of information:

> "* * * We will do our best to comply with your request but you must bear in mind your order was booked rather late and we have commitments for other rice and we are doing our best to distribute what we mill to our customers so that they will all have some rice. * * *"

In other words, Appellee was much more concerned in keeping the good will of its other customers than in performing its contract obligations. The fact that Appellee could not mill enough rice to fill its commitments is no defense under Missouri law.

This same situation was before the Kansas City Court of Appeals in Eaton v. J. R. Crowe Coal and Mining Company, 142 S. W. 1107, 161 Mo. App. 30. In this case plaintiff and defendant entered into a contract for the delivery of a certain number of carloads of coal to be delivered as ordered during season not to exceed one car per day at a given price. The contract provided that all orders and contracts were subject to car supply, strikes, accident and causes beyond the control of the shipper. Defendant shipped 5 cars under the contract leaving 45 cars yet due plaintiff. Upon failure of defendant to deliver, plaintiff brought suit and defendant claimed immunity from liability on the theory that other commitments of defendant were in excess of defendant's production of coal and that it was, therefore, impossible for defendant to perform. The Court very properly rejected this defense and stated:

> "It is contended by Appellant that the evidence is conclusive that the failure of defendant to supply coal was because defendant's contracts to furnish a quantity of coal to plaintiff and others was in excess of the production; therefore the conditions of the clause in the letterhead were not material. (referring to the clause: All orders and contracts subject to car supply, strikes, accident and causes beyond the control of defendant.) This contention is well founded." l. c. 1108.

It is clear that Appellee cannot escape liability on this ground.

CONCLUSION.

The United States Court of Appeals has not therefore decided a federal question in a way which conflicts with any applicable decision of this Court but has decided this case consistently with all pertinent decisions of this Court and in so deciding has followed the accepted and usual course of judicial proceedings.

Wherefore, Respondent urges that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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